2003

State of Utah v. Richard Lee Potter : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. RICHARD LEE POTTER, Defendant/Appellant.	**BRIEF OF APPELLANT** APPELLANT IN CUSTODY PRIORITY 2 **Case # 20030105-CA**

BRIEF OF APPELLANT

AN APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT, JURY CONVICTION OF TWO COUNTS OF DISTRIBUTION OF A CONTROLLED SUBSTANCE, FIRST DEGREE FELONIES IN VIOLATION OF UTAH CODE ANNOTATED § 58-37-8(1)(A)(ii), IN AND FOR ROOSEVELT DIVISION, DUCHESNE COUNTY, STATE OF UTAH, THE HONORABLE JOHN R. ANDERSON PRESIDING.

JULIE GEORGE (6231)
32 EXCHANGE PLACE, SUITE 101
SALT LAKE CITY, UT 84111
Attorney for Appellant

MARK SHURTLEFF
LAURA DUPAIX
Utah Attorney General's Office
P.O. Box 140854
Salt Lake City, Utah 84114-0854

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. RICHARD LEE POTTER, Defendant/Appellant.	**BRIEF OF APPELLANT** APPELLANT IN CUSTODY PRIORITY 2 **Case # 20030105-CA**

BRIEF OF APPELLANT

AN APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT, JURY CONVICTION OF TWO COUNTS OF DISTRIBUTION OF A CONTROLLED SUBSTANCE, FIRST DEGREE FELONIES IN VIOLATION OF UTAH CODE ANNOTATED § 58-37-8(1)(A)(ii), IN AND FOR ROOSEVELT DIVISION, DUCHESNE COUNTY, STATE OF UTAH, THE HONORABLE JOHN R. ANDERSON PRESIDING.

JULIE GEORGE (6231)
32 EXCHANGE PLACE, SUITE 101
SALT LAKE CITY, UT 84111
Attorney for Appellant

MARK SHURTLEFF
LAURA DUPAIX
Utah Attorney General's Office
P.O. Box 140854
Salt Lake City, Utah 84114-0854

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law:
STATE:

FEDERAL:

Statutes:

Rules:

IN THE UTAH COURT OF APPEALS	
STATE OF UTAH, Plaintiff/Appellee, v. RICHARD LEE POTTER, Defendant/Appellant.	**BRIEF OF APPELLANT** PRIORITY 2 **Case # 20030105-CA**

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a Jury conviction and final Judgement and Commitment in the Eighth Judicial District Court, Duchesne, County, Roosevelt Division for a jury trial and subsequent sentence of imprisonment for five years to life in prison for a conviction of two counts of Distribution of a Controlled Substance enhanced for prior conviction of drug crimes, both First Degree Felony violations of Utah Code Annotated §58-37-8, before the Honorable Judge John R. Anderson on January 9, 2003.

This appeal is filed pursuant to the Utah Rules of Criminal Procedure. This Court has jurisdiction to review the conviction pursuant to §58-37-8(2)(a)(i)and Rule 3(a) and Rule 4 of the Utah Rules of Appellate Procedure and Utah Code 78-2a-3.

STATEMENT OF ISSUE PRESENTED ON APPEAL
AND STANDARD OF APPELLATE REVIEW

Mr. Potter raises one issue for review and argues error based on either plain error and/or ineffective assistance of counsel. Mr. Potter asserts that the Information filed against him set forth

that Mr. Potter's crime was distribution of drugs while having a prior conviction. However, no evidence was ever presented to the jury about a prior conviction. Therefore the jury was improperly put on notice of prior crimes without the state ever having to address proper evidentiary rules. Such action prejudiced the jury and resulted in an improper conviction which did not conform to the Information or in the alternative convicted him of an enhanced crime without the sufficient evidence to do so.

STANDARD OF REVIEW:

The trial court's failure to either require an amended Information or to require the prosecution to put on sufficient evidence of the prior conviction was Plain Error.

When a claim such as this is not preserved at the trial court level this Court can only review the matter if mistake is one of plain error–meaning it is so obvious that the Court should have discovered the problem and moved to address the issue sua sponte. "To succeed on a claim of plain error, a defendant has the burden of showing `(I) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful.'" State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993), See also State v. Helmick, 9 P.3d 164 (Utah 2000).

To establish ineffective assistance of counsel, a defendant must show that trial counsel "`rendered deficient performance [that] fell below an objective standard of reasonable professional judgment' and that `counsel's performance prejudiced'" the defendant. State v. Maestas, 984 P.2d 376 (Utah 1999), citing Strickland v. Washington, 466 U.S. 668 (1984).

Where ineffective assistance of counsel claims are raised for the first time on appeal they are reviewed as a matter of law. See Maestas, Id.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Any relevant text of constitutions, statutory provisions, or rules referenced in this brief and pertinent to the issues now before the court on appeal are contained herein or attached to this brief.

STATEMENT OF THE CASE

On April 18, 2002, the Duchesne County Attorney filed a four count indictment against Mr. Potter in the Roosevelt Department alleging illegal drug distribution (Record of Trial Court, 1 & 2). Count One alleged Distribution of a Controlled Substance (Second Degree Felony) and Counts Two Three and Four alleged Distribution of a Controlled Substance in a Drug Free Zone while having a prior drug offense conviction making the remaining three counts First Degree Felony charges (Rt. 2).

A Preliminary Hearing was held on May 23, 2002 in which the trial court bound Mr. Potter over on all four charges (Rt. 30).

On July 12 Mr. Potter requested new counsel and the court heard the matter by way of motion hearing on July 18, 2002 (Rt. 38 & 42). The motion was denied and trial counsel Karen Allen was kept on the case.[1]

Karen Allen filed a Motion for a Change of Venue (Rt. 120) which was denied (Rt. 128)

---

[1]Mr. Potter originally requested an appeal listing this as a possible issue for appeal. However, any claim raised by Mr. Potter about Karen Allen was addressed at the hearing. Issues of not meeting with her enough were cured by having him relocated to the County jail close to Ms. Allen's office. All pre-trial motions dealing with change of venue, separate trials on the four counts and the 120 day detainer issue were filed and addressed by the trial court. No claims or evidence appear after the first allegation that any ineffective assistance of counsel claims appear or continued other than to the extent they are raised here in order to bring this matter before this Court for review.

and a Motion to Sever the Counts of the Information for trial (Rt. 131). The Motion to Sever was granted and Counts One and Two were ordered to be tried separately (Rt. 134).

A trial was started on August 27, 2002 and counsel made a Motion for a Mistrial that was denied based on a statement made by a jury panel member before the jury was seated. (Rt. 139). The jury was excused and trial was re-scheduled to September 24, 2002 due to remarks made by a jailer who was on the jury panel (Rt. 138) however, the court was clear that it did not declare a mistrial but merely continued the trial.

On September 24, 2002 a jury trial proceeded as to Count One and Count Two (Rt. 191) and the jury convicted Mr. Potter of both the second and the first degree charges. To date Mr. Potter has not claimed any appeal issues as to that trial and does not claim any issues on appeal regarding the sentence on the entire case.

On November 15, 2002 the second trial on Counts Three and Four proceeded (Rt. 254). At that time the Court located the copy of the 120 day disposition through the jail and the follow-up on August 29, 2002 to see why it was not granted as August 30, 2002 would be the 120 day mark (Rt. 246).

The trial court denied the argument made by counsel regarding the 120 day detainer and ruled that any delay was proper in that the first delay was the motion to sever and then that the first trial had to be continued to prevent any prejudice to the defendant based on the jury panel member's remark (Rt. 246).

The jury convicted Mr. Potter of both Count Three and Count Four (Rt. 246).

Mr. Potter was sentenced on January 9, 2003 for all four counts he was convicted of and the trial court gave him concurrent sentences on all four counts and ran them concurrently with the

sentence he was currently serving. (Rt. 277).

Mr. Potter timely appealed the conviction (Rt. 263) and the trial court appointed Julie George to pursue the appeal.

Appeals counsel sought and was granted a continuation for filing the opening brief in this case and the brief is due on or before July 27, 2003, with filing on July 28th, the next business day of the calendar.

STATEMENT OF THE FACTS

Mr. Potter was accused of selling methamphetamine in a drug free zone on September 24 and September 25 of 2001 (Trial Transcript, Page 69). Two police officers, Brad Draper and Wayne Hollobeke met a confidential informant, Susie Springer and she agreed to purchase methamphetamine on behalf of the officers in numerous drug sting operations in the tri-city area (T. 69). On September 24 Mr. Potter met Springer and got into her vehicle. Springer drove him to the post office where she paid him $100 in cash and he gave her a little bag of methamphetamine which Springer took back to the officers (T. 69).

The next day Mr. Potter met with Springer again and $50 in cash was exchanged for drugs. The drugs were tested (nine months after the seizure) by the crime lab and were deemed to be methamphetamine. The parking lots where the drugs were exchanged are considered drug free zones (T. 70).

The state called as its first witness Brad Draper who testified before the jury that he was employed with the Uintah Basin Narcotics Task Force (T. 74). Draper testified that he used Springer as a confidential informant and put a body wire on her before the buy. He searched her to make sure she had no drugs on her person and then gave her money to go purchase drugs from

Mr. Potter (T. 75-80). The police determined at the first transaction that Mr. Potter had more drugs to sell if Springer could come up with the money so the police sent her back the next day to buy more drugs (T. 81).

The next day Springer was searched again, her car was searched, she wore a body wire and went back to the trailer court where Mr. Potter resided and again picked him up in her car to go to a parking lot to exchange the drugs for money (T. 82).

Draper testified that after the first drug buy he knew Mr. Potter had the ability to sell more so he purposely did not arrest him but went back with more money for a second buy with the same informant (T. 92).

Springer testified that she was a single mother of four children and that her main source of income during the time she set up Mr. Potter was the money she made in cash from the drug deals for the strike force. Springer was paid $50 in cash for each drug deal and she made 150 deals approximately that winter (T. 111). Springer only got paid if she actually could show she bought the drugs (T. 134).

At no time was evidence presented to the jury that Mr. Potter had a prior conviction or that conviction of one count would constitute a prior drug convictions for enhancement purposes on counts three and four.

After the close of the evidence and during deliberation the Court addressed the 120 detainer issue raised by Mr. Potter. Mr. Potter filed a 120 detainer on May 1, 2003. The detainer was approved and received by the jail as of May 6, 2001 (T. 144). However, the trial in this case was not held until after the 120 days had expired. The 120 time period had expired by the first trial date in which the trial was continued in August due to the jury panel member's remarks during jury

selection (T. 144-145). The delay in the second trial was due to defendant's motion which was granted, to sever the counts and try them separately.

The trial judge determined that good cause was shown for the trial date set outside the 120 detainer time and therefore the lack of speedy trial was justifiably excused for good cause (T. 146).[2]

After deliberation the jury returned a guilty verdict on both counts (T. 147-148). Mr. Potter was sentenced concurrently on all four counts and concurrently to his prior conviction and sent to the Utah State Prison for the five to life sentences.

SUMMARY OF ARGUMENT

The Information in this case charges Mr. Potter with Distribution of Methamphetamine after having been convicted of a drug crime in his past (TR. 3-4). However, no where either in opening statements, the case in chief, rebuttal or closing arguments does the state ever put on any evidence of a prior crime (T. 70-148). However, the jury clearly was put on notice of the prior conviction due to the information. By not amending the Information the jury was put on notice that Mr. Potter had a prior drug conviction. However, unless the jury is properly presented with such information for purposes of enhancement then it would not have been brought to their attention at all. Mr. Potter asserts that for the state to properly enhance his sentence for prior crimes, the issue of prior crimes has to be addressed by the jury. However, no evidence was presented to the jury on the prior crime and therefore no enhancement was proper unless the

---

[2]Mr. Potter initially wrote to counsel and sought to raise as an issue the violation of the 120 detainer. Although the second trial was outside the 120 days, the first trial was timely. The second trial was delayed for good cause reasons set forth in the most recent opinions of this Court and therefore that issue has not been briefed Only issues deemed viable under the current case law have been raised.

enhancement was solely based on the drug free zone where the drug buys occurred. If that was the case then the Information should have been amended to conform with the evidence presented in this case and it was not done. Therefore the Information alleged an enhancement that was never presented to the jury in the proper way to enhance the conviction.

ARGUMENT

THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO THE JURY REGARDING THE PRIOR CONVICTION. THEREFORE, EITHER THE CONVICTION FAILS FOR INSUFFICIENT EVIDENCE OR IT FAILS BECAUSE THE INFORMATION AND JUDGMENT AND COMMITMENT DOES NOT ADEQUATELY REFLECT THE CONVICTION RENDERED BY THE JURY.

Mr. Potter alleges that it was plain error for the Trial Court to fail to order the State correct the "prior conviction" language in the information; or in the alternative to force the state to properly present it to the jury for use as an enhancement. As the State did neither; it did not amend the Information and it failed to properly present the information of the prior conviction to the jury in an effort to properly enhance the conviction under the statute–the jury was left with an Information stating that Mr. Potter had a prior drug conviction. Mr. Potter asserts that the trial court's failure to correct the error prejudiced him in that the jury was improperly put on notice that he had a prior conviction when no evidence of that was necessary due to the drug free enhancement being used at trial.

Furthermore, if this Court determines that the Trial Court did not commit plain error, then Mr. Potter asserts that his trial attorney committed ineffective assistance of counsel when she failed to raised the issue below. Once it was clear that the prosecution was not going to use the prior conviction to enhance the crime, but rather, it intended to use the fact that the drug sales were committed in a drug free zone, the court or defense counsel should have insisted that the

Information be amended to conform with the evidence.

Failure to make that request left a result of a jury conviction for a crime that did not match the Information and prejudiced the jury in that the jury was put on notice of a prior conviction when it was not properly an issue for them to know.

Under Utah Rules of Evidence Rule 404b, a prior conviction can only be used when it is for a proper purpose.

Rule 404(b) of the Utah Rules of Evidence provides: Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In other words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of [r]ules 402 and 403.

Utah R. Evid. 404(b).

Therefore, prior bad acts testimony is admissible under rule 404(b) "if the evidence is relevant to a proper, non-character purpose, unless its danger for unfair prejudice and the like substantially outweighs its probative value." State v. Bradley, 57 P.3d 1139, 1144 (Utah App. 2002), quoting, State v. Widdison, 28 P.3d 1278 (Utah 2000).

Here, by not amending the Information the jury was, without the required analysis of the trial court, put on notice of Mr. Potter's prior conviction. Such material, of a prior drug dealing conviction that is being used to enhance the current drug dealing allegation against Mr. Potter is clearly prejudicial. The only way that material would have been more probative than prejudicial is if the State had no choice but bring the material before the jury in order to prove their case. They

filed the Information alleging that is why the enhanced the charge. However, they never made the prior conviction an issue for the jury to determine and instead used the drug free zone as the enhancing factor in the case. Knowing that was how they planned to proceed the State should have amended the Information to accurately reflect the evidence presented and the conviction given. No such Amendment has ever been made. Indeed the Judgement and Conviction which is attached clearly shows that the Convictions are for "Distribution of or Arranging to Distribute a Controlled Substance, in a Drug-Free Zone, with a Prior Conviction (Methamphetamine)-a First Degree Felony" (See Judgment and Conviction Page 1).

Mr. Potter asserts that the State cannot have it both ways; they cannot file charges that enhance his crime for having prior convictions, put the jury on notice of his prior bad acts (conviction) without proper trial court analysis and argue that he was not prejudiced because they never put on evidence to that fact at trial. If they failed to put on evidence of that fact at trial (It was not brought up anywhere in the evidence) then the State cannot argue that the jury found the element of the crime necessary to convict Mr. Potter of the crime. There is clearly insufficient evidence to convict Mr. Potter of the enhanced crime if the jury was never provided with any evidence of a prior conviction.

In a claim of insufficient evidence to support a conviction Mr. Potter would have to argue that there was insufficient evidence presented to a jury to support the verdict.

" This court has stated that in order to prevail on a sufficiency challenge to a jury verdict, "the one challenging the verdict must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict."State v. Hopkins, 989 P.2d 1065 (Utah 1999) (quotation omitted)." As quoted in State v.

Prichett, 69 P.3d 1278 (Utah 2003).

Here, Mr. Potter can marshal all of the evidence by showing that at the preliminary hearing (PL, #4), the prosecutor informed the judge that he intended to enhance the conviction by arguing that Mr. Potter had previously been convicted of a drug crime by use of the first two counts in the Information. At trial, the Information was not amended and clearly indicates that Mr. Potter is charged with Distribution of Methamphetamine enhanced due to a prior conviction. However, no where in the trial transcript is the jury ever given any evidence of the prior crime. Therefore, the jury had absolutely no basis to find Mr. Potter guilty of the enhanced crime if no evidence supporting the enhancement was given to the jury. Indeed, the mere allegation that Mr. Potter had a prior crime, as set forth in the Information, was sufficient to taint the jury and result in the prejudicial outcome of the guilty verdict. Finally, no where in the trial transcript is it set forth that the trial judge determined the proper 404b analysis to allow the taint of the prior conviction to get to the jury or in the alternative to rule that as a major element of the State's case in chief the proof the prior conviction was necessary to prove the crime at issue.

Utah Code §58-37-8 Provides :(1)(a)...[I]t is unlawful to (ii)distribute a controlled or counterfeit substance...(iii)possess a controlled or counterfeit substance with intent to distribute;

Section (b) provides that such an act is a Second Degree Felony unless the person has a prior conviction for such a crime and then it is enhanced to a First Degree Felony.

The State will argue that it was the distribution in a Drug Free Zone (parking lot) that enhanced the crime pursuant to subsection (4)(viii). However, the Information and Judgement and Conviction do not support that Mr. Potter was charged with the Drug Free Zone Enhancement. They clearly reflect that he was charged with the prior crime enhancement.

The Information and the Judgement and Commitment do not conform with the evidence produced at trial. Neither have amended to this date. Furthermore, if Mr. Potter was charged with an enhanced crime alleging that he had a prior conviction, the only to properly convict of him that crime to produce that evidence to a jury. Mr. Potter argues that the prior crimes enhancement is similar to the "gang enhancement" and that to properly convict him of the enhancement the jury had to find those elements beyond a reasonable doubt.

Most recently in State v. Smith, 42 p.3d 1261 (Utah 2002) the Court reiterated the burden necessary to prove the gang enhancement providing:

"[I]n State v. Lopes 980 P.2d 191, (Utah 1999) held that subsection (5)(c) of section 76- 3-203.1 was unconstitutional. *See id.* at ¶ 17. The Court based this holding on its conclusion that sentencing enhancements "create[ ] a specific new crime or a crime of a higher degree[, and a]s such, each of the elements [of the enhancement] must be proved beyond a reasonable doubt." *Id.* at ¶ 15. Significantly, the Utah Supreme Court explicitly did not distinguish between sentencing enhancements that provide for a mandatory minimum term and sentencing enhancements that prescribe a maximum term beyond that otherwise allowed. Instead, the Court held:
When the legislature passed the gang enhancement provision, [Utah Code Ann. § 76-3-203.1 (1995), which imposes a mandatory minimum term,] it acted just as it did when it passed the firearm enhancement provision[, Utah Code Ann. § 76-3-203 (Supp.1998), which imposes an additional, consecutive term]: it mandated imposition of an enhancement only upon proof of elements over and above those required for the crime of lesser consequence.... As such, each of the elements must be proved beyond a reasonable doubt.
Id. Thus, under *Lopes*, imposition of either type of sentence enhancement requires that the relevant facts be found by the trier of fact, beyond a reasonable doubt."

Mr. Potter argues that if the State wanted to properly convict him of the prior crimes enhancement they had to put on evidence to the jury and prove that prior crime beyond a reasonable doubt. They did not. They did nothing more than charge him with the crime in the Information and use that allegation to prejudice the jury. Mr. Potter asserts that if the State did not intend to use the prior crime as an enhancement they should have amended the Information and made sure no taint of the prior conviction got to the jury. Additionally, the Judgment and

Commitment should not have listed as convicted of a crime that was never at issue, i.e., conviction of drug distribution with a prior crime enhancement.

When a claim such as this is not preserved at the trial court level this Court can only review the matter if mistake is one of plain error–meaning it is so obvious that the Court should have discovered the problem and moved to address the issue sua sponte. "To succeed on a claim of plain error, a defendant has the burden of showing `(I) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful.'" State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993), See also State v. Helmick, 9 P.3d 164 (Utah 2000).

The error of having the prior conviction listed in the Information but not addressed in opening statements was clear. The trial Court was privy to the nature of the case and the issue of the prior conviction as it was addressed at the preliminary hearing (PLT. #4). And yet the evidence of the prior conviction was never mentioned in the jury instructions. When it was clear to the Court that the prior conviction was not going to be necessary element to the trial and the government was using the drug free zone as the basis for the enhancement not the prior conviction, the trial judge should have requested an Amend Information to conform with the evidence.

The error was clearly harmful to the defendant in that the jury, with no legitimate basis or reason, was told by way of the Information, that Mr. Potter had a prior conviction.

To establish ineffective assistance of counsel, a defendant must show that trial counsel "`rendered deficient performance [that] fell below an objective standard of reasonable professional judgment' and that `counsel's performance prejudiced'" the defendant. State v. Maestas, 984 P.2d 376 (Utah 1999), citing Strickland v Washington, 466 U.S. 668 (1984).

Mr. Potter asserts that in the event that this Court does not find that this issue is properly

before the Court on the basis of Plain Error, that it is properly before the Court on the basis of ineffective assistance of counsel in so far that it is reasonable that his attorney should have made sure that the Information conformed with evidence presented to the jury. Failure to do so left the jury with the highly prejudicial information that he was convicted of drug distribution in the past. Such evidence or inference was improper where the State was not relying on the prior conviction but the drug free zone element to enhance the conviction.

Clearly Mr. Potter was prejudiced by error where the jury, without the benefit of a 404b analysis was put on notice of prior distribution conviction. It was clearly not necessary and was obviously prejudicial and therefore trial court's's failure to object or cure the defect was ineffective assistance of counsel.

CONCLUSION

Mr. Potter respectfully requests that this Court overturn his conviction in this case for the reasons set forth above and remand the case for a new trial to conform with the Information.

RESPECTFULLY SUBMITTED this 27 day of July, 2003.

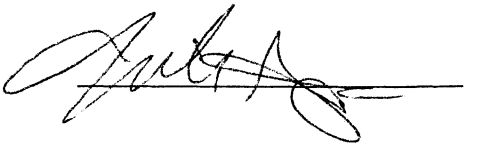
JULIE GEORGE
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I hand-delivered or mailed, first class postage prepaid, a true and correct copy of the foregoing Brief to:

LAURA DUPAIX
ASSISTANT UTAH ATTORNEY GENERAL
CRIMINAL APPEALS DIVISION
P.O. BOX 140854
SALT LAKE CITY, UTAH 84114-0854

DATED THIS 28 DAY OF July 2003.



ADDENDA A

CLEVE HATCH #5609
DUCHESNE COUNTY ATTORNEY
DAVID K. CUNNINGHAM #7497
DEPUTY DUCHESNE COUNTY ATTORNEY
Attorney for Plaintiff
P.O. Box 206
Duchesne, Utah 84021
(435) 738-0184

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH
DUCHESNE COUNTY, ROOSEVELT DEPARTMENT
---oooOooo—

STATE OF UTAH,	:	**JUDGMENT AND COMMITMENT ORDER**
Plaintiff,	:	
vs.		
	:	Criminal No. 021000156
RICHARD LEE POTTER,	:	
Defendant.	:	Judge John R. Anderson

---oooOooo—

DISTRIBUTION OF OR ARRANGING TO DISTRIBUTE A CONTROLLED SUBSTANCE (METHAMPHETAMINE) - A SECOND DEGREE FELONY

DISTRIBUTION OF OR ARRANGING TO DISTRIBUTE A CONTROLLED SUBSTANCE, IN A DRUG-FREE ZONE, WITH A PRIOR CONVICTION (METHAMPHETAMINE) - A FIRST DEGREE FELONY

DISTRIBUTION OF OR ARRANGING TO DISTRIBUTE A CONTROLLED SUBSTANCE, IN A DRUG-FREE ZONE, WITH A PRIOR CONVICTION (METHAMPHETAMINE) - A FIRST DEGREE FELONY

DISTRIBUTION OF OR ARRANGING TO DISTRIBUTE A CONTROLLED SUBSTANCE, IN A DRUG-FREE ZONE, WITH A PRIOR CONVICTION (METHAMPHETAMINE) - A FIRST DEGREE FELONY

The above-entitled case came before the Court for Sentencing on Thursday, January 9, 2003, the Honorable Judge John R. Anderson, presiding. The defendant was present and was represented by his attorney, Karen Allen. The State of Utah was represented by Cleve Hatch,

Duchesne County Attorney. The Court had received and reviewed the Pre-Sentence Investigation Report prepared by Adult Probation and Parole. Statements were made by counsel for the parties and the defendant.

NOW THEREFORE, based upon the file and record herein, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

That the defendant has been convicted by a Jury of the offenses of **Distribution of or Arranging to Distribute a Controlled Substance, (Methamphetamine), a Second Degree Felony**, in violation of Section 58-37-8 UCA (1953) as amended; **Distribution of or Arranging to Distribute a Controlled Substance, In a Drug-Free Zone, With a Prior Conviction (Methamphetamine), a First Degree Felony**, in violation of Section 58-37-8 UCA (1953) as amended; **Distribution of or Arranging to Distribute a Controlled Substance, In a Drug-Free Zone, With a Prior Conviction (Methamphetamine), a First Degree Felony**, in violation of Section 58-37-8 UCA (1953) as amended; and **Distribution of or Arranging to Distribute a Controlled Substance, In a Drug-Free Zone, With a Prior Conviction (Methamphetamine), a First Degree Felony**, in violation of Section 58-37-8 UCA (1953) as amended.

That for the offense of **Distribution of or Arranging to Distribute a Controlled Substance (Methamphetamine), a Second Degree Felony**, it is hereby ordered that the defendant is sentenced to serve an indeterminate term of not less than one (1) year nor more than fifteen (15) years in the Utah State Prison. That for the offense of **Distribution of or Arranging to Distribute a Controlled Substance, In a Drug-Free Zone, With a Prior Conviction (Methamphetamine), a First Degree Felony**, it is hereby ordered that the defendant is sentenced to serve an indeterminate term of not less than five (5) years and could be for life in the Utah State Prison. That for the offense of **Distribution of or Arranging to Distribute a**

Controlled Substance, In a Drug-Free Zone, With a Prior Conviction (Methamphetamine), a First Degree Felony, it is hereby ordered that the defendant is sentenced to serve an indeterminate term of not less than five (5) years and could be for life in the Utah State Prison. That for the offense of **Distribution of or Arranging to Distribute a Controlled Substance, In a Drug-Free Zone, With a Prior Conviction (Methamphetamine), a First Degree Felony**, it is hereby ordered that the defendant is sentenced to serve an indeterminate term of not less than five (5) years and could be for life in the Utah State Prison. Said prison sentences shall run concurrent with each other, and concurrent to the sentence the defendant is currently serving at the Utah State Prison.

It is further ordered that the defendant pay restitution to the Uintah Basin Narcotics Strike Force, c/o Vernal City Police Department, 437 East Main Street, Vernal UT 84078, in the sum of $490.

The defendant shall provide a DNA sample and pay the required fee.

Commitment shall commence forthwith.

The defendant is remanded to the Duchesne County Sheriff to be transported to the Utah State Prison. Thereafter, the defendant is remanded to the custody of the Board of Pardons.

DATED this 6th day of ~~January~~ Feb., 2003.

BY ORDER OF THE COURT

JOHN R. ANDERSON
DISTRICT COURT JUDGE

Approved as to form:

Karen Allen

Karen Allen
Attorney for Defendant

CERTIFICATE OF DELIVERY

I hereby certify that on the 15th day of January, 2003, I delivered a true and correct copy of the foregoing proposed Judgment and Commitment Order to the attorney for the defendant, at:

Karen Allen
Attorney at Law
PO Box 409
Duchesne UT 84021

by depositing in her box at the Duchesne County Justice Center, Duchesne, Utah.

Debbie Mitchell
Legal Assistant

ADDENDA B

KAREN ALLEN #7454
Attorney for the Defendant
P.O. Box 409
Duchesne, UT 84021
Telephone: (435) 738-2432

In The Eighth Judicial District Court of the State of Utah
Duchesne County – Roosevelt Department

THE STATE OF UTAH	:	**NOTICE OF APPEAL**
Plaintiff,	:	
vs.	:	Criminal No. 021000156
RICHARD LEE POTTER,	:	
Defendant.	:	Judge John R. Anderson

COMES NOW the Defendant, RICHARD LEE POTTER, and serves notice of his intent to appeal the decision of the above-entitled Court which was settled in its entirety on November 15, 2002. This hearing concluded the matter wherein the defendant was found guilty to the charges of Distribution of a Controlled Substance in a Drug-Free Zone, a First Degree Felony and Distribution of a Controlled Substance, a Second Degree Felony. The Defendant further specifies that he appeals from the decision of the Court on the basis that the Court improperly admitted matters into evidence which were without foundation, were not the best evidence and were immaterial to the issues and further that the. Court did not correctly apply the law to the facts presented at trial.

DATED this 30th day of January, 2003.

Karen Allen
Attorney for Defendant

CERTIFICATE OF MAILING OR DELIVERY

I hereby certify that I mailed or delivered a true and correct copy of the foregoing Notice of Appeal to:

Cleve Hatch
Duchesne County Attorney
Deputy Duchesne County Attorney
P.O. Box 206
Duchesne, UT 84021

Mr. Richard Lee Potter (Inmate)
Utah State Prison
P.O. Box 250
Draper, Utah 84020

first-class postage prepaid, this 30th day of January, 2003.

Sandi Mott
Sandi Mott
Legal Assistant